



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 8, 1993

Mr. Jeff Hankins
Legal Assistant, Regulated Lines Section
Legal Services, 110-1
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR93-745

Dear Mr. Hankins:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), Government Code chapter 552.¹ Your request was assigned ID# 19128.

The Texas Department of Insurance (the "department") has received two requests for information relating to workers' compensation insurance carriers. Specifically, the requestor seeks "the names and status of any workers' compensation insurance carriers and the TDI attorney assigned thereto that are the subject of a current investigation for any business practices that could have been the subject of the Commissioner's Directive to all Workers' Compensation Insurance Carriers dated April 1, 1991," and "the names of any workers' compensation insurance carriers that are (a) not now nor (b) have never been the subject of a currently pending investigation for any business practices that could have been the subject of the Commissioner's Directive to all Workers' Compensation Insurance Carriers dated April 1, 1991." You have submitted the requested information to us for review. You claim that it is excepted from required public disclosure by sections 552.103(a), 552.107, and 552.111 of the Government Code.

We first address information regarding "the names and status of any workers' compensation insurance carriers and the TDI attorney assigned thereto that are the subject

¹We note that the Seventy-Third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

of a current investigation." You claim that this information is protected by section 552.103(a) of the act. To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). You contend that the requested information relates to anticipated disciplinary actions. You cite Open Records Letter No. 92-248 (1992) in which this office concluded that under section 552.103(a) the department may withhold certain documents since they related to anticipated disciplinary actions. The information at issue here relates to the same disciplinary actions the department anticipated in Open Records Letter No. 92-248 (1992).

We have examined the memorandum submitted to us for review. The memorandum contains five columns of information. The columns are titled "Company Name," "Notice Letter," "Alleged Amount," "Attorney/Company Rep.", and "Activity." In Open Records Decision No. 349 (1982), this office held that section 552.103(a) does not apply when the opposing party to the anticipated litigation has seen or had access to the requested information. Generally, information may not be withheld under any exception of the Open Records Act if it has already been publicly disclosed, unless such information is made confidential by law. *See* Open Records Decision Nos. 435, 436 (1986). We note that some of the workers' compensation insurance carriers at issue here have been given notice of the department's intention to institute disciplinary action. Others have received requests for information from the department. Thus, since the department's correspondence with the carriers informs those carriers that they are being investigated, there is no justification under section 552.103(a) for withholding information which discloses that an insurance carrier is being investigated by the department. Accordingly, we conclude that the names of the insurance carriers listed on the memo, all of whom the department is apparently investigating, may not be withheld from required public disclosure pursuant to section 552.103(a) of the Government Code.²

However, with respect to the information contained under the column titled "Activity," we conclude that you have made the requisite showing that it relates to pending litigation for purposes of section 552.103(a); such information may therefore be withheld from required public disclosure.³

You also raise sections 552.107 and 552.111 of the Open Records Act. Since we concluded above that the department may not withhold the name of the company based

²We note the requestor does not seek some of the information on the memo, i.e., the date the notice letter was sent, the alleged amount, and the company's attorney or representative.

³In reaching this conclusion we assume, of course, that the opposing party to the litigation has not previously had access to the records at issue. *See* Open Records Decision Nos. 349, 320 (1982). We also note that the applicability of section 3(a)(3) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

on section 552.103, we must consider whether these two exceptions apply to those names. Section 552.107 of the act excepts information if:

(1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas; or

(2) a court by order has prohibited disclosure of the information.

In Open Records Decision No. 574 (1990), this office held that section 552.107 protected information that revealed client confidences to an attorney or that revealed the attorney's legal advice, but did not protect purely factual information.

Section 552.111 excepts information that constitutes an

interagency or intraagency memorandum or letter which would not be available by law to a party in litigation with the agency.

In Open Records Decision No. 615 (1993), this office recently reexamined the section 552.111 exception and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. An agency's policymaking functions, however, do not encompass routine personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.* at 5-6. In addition, factual information is not excepted by section 552.111. *Id.*

We conclude that since the name of the insurance carrier is factual information, sections 552.107 and 552.111 do not apply. Thus, you must release the company names.⁴

You also contend that release of information regarding workers' compensation insurance carriers that "have never been the subject of a currently pending investigation for any business practices that could have been the subject of the Commissioner's Directive to all Workers' Compensation Insurance Carriers dated April 1, 1991" would enable the requestor to deduce which workers' compensation insurance carriers are

⁴We remind you that the custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental body does not show how an exception applies to the records, it will ordinarily waive the exception. See Attorney General Opinion JM-672 (1987).

subject to pending investigations.⁵ In Open Records Decision No. 422 (1984), this office determined that where information regarding intentionally inflicted gunshot wounds is excepted from required public disclosure, release of information revealing whether the wound is accidental or intentional may be withheld, since to reveal only which wounds were accidental would necessarily reveal which ones were intentional. *But see Department of the Air Force v. Rose*, 425 U.S. 352, 380 (1976) (rejecting the argument that disclosure was barred in any case in which it could not be guaranteed that disclosure would not lead someone to guess the substance of information made confidential); Attorney General Opinion H-223 (1974) (fact that a taxpayer requested reconsideration of his tax status is public even though information concerning his status is made confidential by statute); Open Records Decision Nos. 212, 188 (1978); 88, 102 (1975); 40 (1974). As noted above, however, the names of companies which are being investigated is public information. Accordingly, we conclude that release of information regarding workers' compensation insurance carriers that are *not* subject to pending investigations may not be withheld from required public disclosure under section 552.103(a) of the Government Code.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/GCK/rho

Ref.: ID# 19128
ID# 19188

cc: Mr. James N. Wood
206 West Thirteenth Street, Suite 200E
Austin, Texas 78701
(w/o enclosures)

⁵Because you have not submitted such a list to us for review, we do not know whether such a list in fact exists. Of course, if such a list does not exist, the department has no obligation under the act to produce it. Open Records Decision No. 362 (1983). However, for purposes of this ruling, we assume such a list exists.